In the Supreme Court of the United States.

OCTOBER TERM, 1911.

OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY and OMAHA & COUNCIL BLUFFS RAILWAY & BRIDGE COMPANY, appellants, *v.* INTERSTATE COMMERCE COMMISSION AND The United States.	No. 846.

APPEAL FROM THE UNITED STATES COMMERCE COURT.

MOTION TO ADVANCE.

Comes now the Solicitor General on behalf of the United States and moves the court to advance the above-entitled case for hearing at this term. The appeal is from a final decree of the Commerce Court dismissing the bill of the railroad companies on demurrer interposed by the commission and the United States.

The principal question is as to the validity of an order of the commission requiring the railroads to reduce their fares from 15 cents to 10 cents.

The operation of the order is at present staye
by a temporary injunction from this court entere
on November 6, 1911.

The priority suggested is authorized by section
of the act of June 18, 1910 (36 Stat. L., 542).

Opposing counsel concur in this motion.

FREDERICK W. LEHMANN,
Solicitor General.

JANUARY, 1912.

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Supreme Court U. S.
FILED
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JAMES H. McKENNEY,
Clerk.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. ~~948~~ 458.

OMAHA AND COUNCIL BLUFFS STREET RAILWAY COMPANY

AND

OMAHA AND COUNCIL BLUFFS RAILWAY AND BRIDGE COMPANY,

APPELLANTS,

vs.

INTERSTATE COMMERCE COMMISSION,

DEFENDANT,

AND

UNITED STATES, INTERVENING DEFENDANT,

APPELLEES.

ON APPEAL FROM THE COMMERCE COURT.

Application for a Supersedeas or Order Suspending an Order of the Interstate Commerce Commission to Maintain the Status Quo Pending this Appeal.

JOHN LEE WEBSTER,
Solicitor for Appellants.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. .

OMAHA AND COUNCIL BLUFFS STREET RAILWAY COMPANY

AND

OMAHA AND COUNCIL BLUFFS RAILWAY AND BRIDGE COMPANY,

APPELLANTS,

vs.

INTERSTATE COMMERCE COMMISSION,

DEFENDANT,

AND

UNITED STATES, INTERVENING DEFENDANT,

APPELLEES.

ON APPEAL FROM THE COMMERCE COURT.

Application for a Supersedeas or Order Suspending an Order of Interstate Commerce Commission to Maintain the Status Quo Pending this Appeal.

Now come Omaha and Council Bluffs Street Railway Company and Omaha and Council Bluffs Railway and Bridge Company, appellants, and

make this their application for an order superseding an order and decree of United States Commerce Court entered October 13, 1911, and suspending an order of Interstate Commerce Commission entered under date of November 27, 1909, during the pendency of this appeal, and in support hereof state the following reasons and facts:

First. Omaha and Council Bluffs Street Railway Company, hereafter spoken of as Street Railway Company, is a corporation of the State of Nebraska, incorporated under the constitution and laws of said State relating to the incorporation of street railroads, and owns and operates the street railway lines in the city of Omaha, Nebraska.

Omaha and Council Bluffs Railway and Bridge Company is incorporated under the laws of the State of Iowa as a street railroad company, and hereafter spoken of as the Bridge Company, and owns the street railway lines in the city of Council Bluffs, in the State of Iowa, and a line extending from said city to and over a bridge across the Missouri river into the city of Omaha.

Second. The street cars on the line of said Bridge Company pass upon and along the streets of the city of Council Bluffs and thence to the Missouri river and over the bridge and upon and around a "loop" in the city of Omaha, and thence returning to the city of Council Bluffs, but said cars are not operated upon or along the lines of

the Street Railway Company throughout the corporate limits of the city of Omaha. Passengers from Council Bluffs desiring to go to points in the city of Omaha beyond the said "loop" leave the cars of the Bridge Company and enter upon cars of the Street Railway Company, and thereupon pay separate fare for transportation on the lines of the Street Railway Company. In December, 1902, the Street Railway Company leased the lines of the Bridge Company, but nevertheless since said date the lines of the two companies are operated just as they have been operated before the said lease, as two independent and distinct companies, the cars of one line not passing upon or over the tracks of the other, but transfer from the lines of one company to the lines of the other company in passing from Council Bluffs, Iowa, to Omaha, Nebraska. A flat fare of ten cents is charged from Council Bluffs, Iowa, to Omaha, Nebraska, which includes the fare across the bridge. The Street Railway Company charges a flat fare of five cents on its lines between all points.

Third. The Interstate Commerce Commission, under date of November 27, 1909, made an order requiring the appellant companies, on or before February 1, 1910, to put in force during a period of not less than two years a fare not exceeding ten cents from any point in Council Bluffs, Iowa, to any point within the corporate limits of the city

of Omaha. Said order, in its practical effect, is to require the Street Railway Company in Omaha to receive and carry upon its lines, without compensation, a passenger who may have paid a ten-cent fare to the bridge line for transportation from Council Bluffs into Omaha.

Fourth. The two points of error presented on the appeal are:

(*a*) That the Interstate Commerce Commission had no jurisdiction over "street" railroads.

(*b*) In any event the Interstate Commerce Commission had no authority to make the order directing the Street Railway Company of Nebraska to receive and transport passengers, who may elect to get on its cars, without compensation, simply because such passengers may have paid a ten-cent fare to the Bridge Company for transportation from Council Bluffs, Iowa, into the city of Omaha.

Fifth. In the opinion of the Interstate Commerce Commission (17 I. C. C. Rep., 239) Commissioners Prouty, Knapp, and Cockrell were of the "opinion that the Act to Regulate Commerce did not apply to ordinary street railways," and so expressed themselves in an addendum to the opinion.

Sixth. The appellants herein filed their bill in United States Circuit Court for the District of Nebraska *versus* the Interstate Commerce Com-

mission, praying for an injunction against the enforcement of the said order of the Interstate Commerce Commission on the ground that the said order was made without authority in the Interstate Commerce Commission to make the same for the reasons above stated. To the said bill of complaint the Interstate Commerce Commission filed its demurrer, and thereupon the same came on for hearing for a temporary injunction before Circuit Judges Sanborn, Adams, and Hook. The matter was argued orally and upon printed brief by the solicitors for the respective parties, and the said judges, after retaining the matter under consideration for some two or three weeks, handed down a written opinion and order, holding that the Interstate Commerce Commission did not have jurisdiction over complainant street railway companies, on the ground that street railway companies were not "railroads" within the meaning of the Interstate Commerce Act, and granted a temporary injunction as prayed, upon giving of bond in the sum of ten thousand dollars, and which was done. For a report of said opinion and order of injunction see Omaha and Council Bluffs Street Railway Company *versus* Interstate Commerce Commission, 179 Federal, 243.

Said case was transferred to the United States Commerce Court by operation of law, and thereupon the United States intervened and also filed its demurrer to the bill of complaint, and said case was heard in said court upon the appellants' bill

of complaint and the demurrers of the Interstate Commerce Commission and of the United States thereto; and in due course the said Commerce Court on the same pleadings and on the same facts held that the Interstate Commerce Commission did have jurisdiction to make said order upon the ground that the word "railroad" in the Interstate Commerce Act did include ordinary street railways, and further holding that the said order was not void by reason of the fact that it required the Street Railway Company in Omaha to receive and carry, without additional compensation, the passengers who had paid a ten-cent fare over the said bridge line, and thereupon said Commerce Court entered its order, under date of October 13, 1911, dismissing complainant's bill of complaint. (Judge Knapp did not sit in said case nor take part in the decision thereof.)

Seventh. The appellants, by their solicitor, John Lee Webster, personally applied to the presiding judge of the Commerce Court, and to Judge Mack, the writer of the opinion, to know if the said court would not, under the circumstances, enter an order continuing the temporary injunction or suspending the operation of the order of the Interstate Commerce Commission pending the appeal, but which was not granted, for the reason that the Commerce Court doubted its authority and propriety to make such an order, as your appellants are informed and believe.

Eighth. Section one of the Interstate Commerce Act provides "that the same shall apply to any carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water." The term "railroad" as defined in said act "shall include all bridges and ferries used or operated in connection with any 'railroad.'"

The opening sentence of said section one of said Act to Regulate Commerce also includes corporations or persons engaged in the transportation of oil by means of pipe lines, or partly by pipe lines and partly by railroads, or partly by pipe lines and partly by water, and to telegraph, telephone, and cable companies. And when said section one refers to common carriers it is to "any common carrier or carriers engaged" in transportation by "*railroad,*" or partly by railroad and partly by water. The words "common carrier" as used in said section one, as the section was originally drafted, applied only to railroads, as above stated, and did not refer to or include common carriers outside of, and distinct from, "*railroads.*" By a subsequent amendment to said section one the term "common carrier" was defined to include "express companies and sleeping car companies." Notwithstanding the various amendments to said section one, including thereby different companies and carriers, no amendment was made in terms including "street" railroads. It was stated by Senator Cullom, in a report to the Senate as chair-

man of the committee having charge of the original Act to Regulate Commerce, that the same was not intended to include "street railroads," stage lines, etc.

Ninth. There are many provisions in the Act to Regulate Commerce which are wholly inapplicable to street railroads and many of which provisions are of a character which cannot be enforced or made to apply to street railroads, such as making switch connections, from one to the other, transportation of cars from one line to the other, the establishment of rates for either freight or passengers from one line to the other.

Street railway companies do not have the corporate authority to transport freight, baggage or express, nor to haul the cars of the commercial railroads, nor to permit the same to pass over their lines.

Tenth. It has been held in the State of Iowa that street railroads in said State are not "railroads" within the general meaning of the law (Fidelity Loan and Trust Company *vs.* Douglass, 104 Iowa, 532), and by the pleadings it stands admitted that the bridge company is incorporated as a street railroad under the laws of the State of Iowa.

Eleventh. Under the constitution and statutes of Nebraska street railroads can only be incorporated to construct and operate lines upon the streets of

cities and for the transportation of passengers only. Their articles of incorporation must set forth the streets and termini thereof, upon and along which the street-car tracks are to be constructed, and the right to do so must first be obtained by a vote of the electors of the city. Such street railways do not possess the power of eminent domain, and are limited to the transportation of passengers only upon and along the streets.

For the appellant street railway company to transport freight or to haul the cars of the commercial railroads upon and along its tracks in the city would be beyond its corporate powers and would subject it to proceedings for the forfeiture of its franchise rights.

Twelfth. It has been held in many States, indeed, in most all the States, that the word "railroad," as found in the constitutions and statutes of the States, does not include street railroads, and that the two classes of corporations are absolutely distinct, and it has likewise been held that a street railroad cannot exercise the corporate powers of a commercial railroad, and that a commercial railroad cannot exercise the powers of a street railway. The authorities to these points are nearly all collated in the opinion of the circuit judges in the case reported in 179 Federal, 243.

Thirteenth. So far as your petitioners are informed and believe, the Interstate Commerce Com-

mission has not heretofore made an order regulating rates of fare upon any strictly street railway company outside of the District of Columbia, and the present case is generally regarded as a pioneer case in which it is desired to settle the law upon the questions in this appeal involved.

Fourteenth. The order of the Interstate Commerce Commission was to become effective February 1, 1910, and was suspended by the injunction granted in this case up until the order of the Commerce Court, October 13, 1910, and the two years' life of the order of the Commission would expire February 1, 1912. To require the appellant street railway companies to comply with the order pending this appeal would put said companies to great embarrassment, inconvenience, and expense, as well as irreparable loss and injury, if it be finally held that the Interstate Commerce Commission was without jurisdiction to make the order. The street railway companies charge flat rates, and there is no way by which the passenger over the bridge line could have a ticket of transfer to the lines of the street railway in Omaha, except by the issuance of a form of transfer tickets, which would require the printing of a new form of transfer ticket to be given only to the passenger from Council Bluffs, or *vice versa,* who paid a ten-cent fare; and passengers who ride on commutation tickets, thirty tickets for one dollar and a half, would not be entitled to such transfers under the

order of the Commission. Again, the mayor and council of the city of Omaha require the street railway companies in Omaha to issue universal transfers to all persons riding on its lines, upon the payment of a five-cent fare. The confusion of transfers, and who are entitled to them, and who not entitled, would create great confusion. Again, the street railway company, if the order should be enforced, would be required to carry hundreds of passengers every day on its lines without the payment to it of the flat fare of five cents paid by all other passengers who get on its cars within the limits of the city of Omaha, and would be without remedy to recover or recoup such fares from the thousands of people whom it would be required to transport between this date and the final hearing on this appeal, if the order of the Commission be not stayed or suspended.

Wherefore the appellants pray this court to grant an appropriate order superseding the judgment and decree of the Commerce Court, and suspending, pending this appeal, the order of the Interstate Commerce Commission made under date of November 27, 1909, regulating the fares upon the appellant companies, upon the giving of such bond as this court shall order and direct in the premises.

OMAHA AND COUNCIL BLUFFS
STREET RAILWAY CO.,
OMAHA AND COUNCIL BLUFFS
RAILWAY AND BRIDGE CO.,
By JOHN LEE WEBSTER, *Solicitor.*

DISTRICT OF COLUMBIA, *ss:*

John Lee Webster, being first duly sworn, deposes and says that he is the general counsel of Omaha and Council Bluffs Street Railway Company and of Omaha and Council Bluffs Railway and Bridge Company, incorporations respectively of the States of Nebraska and Iowa; and affiant further states that the facts stated in the foregoing application are true, and that the additional matters therein stated as upon information and belief or by way or argument and inducement are true as he verily believes.

JOHN LEE WEBSTER.

Subscribed and sworn to before me this 25th day of October, 1911.

[Seal of Eustace C. Owen, Notary Public, District of Columbia.]

EUSTACE C. OWEN.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY and OMAHA & COUNCIL BLUFFS RAILWAY & BRIDGE COMPANY, appellants, v. INTERSTATE COMMERCE COMMISSION AND The United States, intervener, appellees.	No. 846.

ON APPEAL FROM THE COMMERCE COURT.

SUGGESTIONS IN OPPOSITION TO THE APPLICATION FOR A SUPERSEDEAS.

The opinion of the learned circuit judge, filed October 5, 1911, Appendix, contains a complete and accurate statement of the case and of the questions involved as the same were presented to the Interstate Commerce Commission and the Commerce Court. The report of the Interstate Commerce Commission is found in *West End Improvement Club* v. *Omaha and Council Bluffs Railway and Bridge Company* (17 I. C. C. R., 239). The order

based upon that report and the subject matter of this suit is as follows:

WEST END IMPROVEMENT CLUB *v.* OMAHA & COUNCIL BLUFFS RAILWAY & BRIDGE COMPANY and OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY.	No. 1004.

This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the defendants be, and they are hereby, notified and required to cease and desist, on or before the 1st day of February, 1910, from charging, demanding, collecting, or receiving their present fare of 15 cents per passenger for the transportation of passengers from Council Bluffs, Iowa, not including Courtland Beach, Iowa, to points on defendants' lines in Omaha, Nebr., or from points on defendants' lines in Omaha, Nebr., to Council Bluffs, Iowa, not including Courtland Beach, Iowa.

It is further ordered, That the said defendants be, and they are hereby, notified and required to establish, on or before the 1st day of February, 1910, and maintain in force thereafter during a period of not less

than two years, a charge for the transportation of passengers from any point on defendants' lines in Council Bluffs, Iowa, not including Courtland Beach, Iowa, to any point on defendants' lines in Omaha, Nebr., or from any point on defendants' lines in Omaha, Nebr., to any point on defendants' lines in Council Bluffs, Iowa, not including Courtland Beach, Iowa, which shall not exceed 10 cents per passenger.

On February 7, 1910, the original bill was filed in the Circuit Court for the District of Nebraska. On March 13, 1910, the Interstate Commerce Commission filed its demurrer and answer. On April 25, 1910, the Circuit Court issued a temporary restraining order against the order of the Interstate Commerce Commission. On March 6, 1911, the cause was transferred to the Commerce Court. On April 3, 1911, the United States intervened. On May 26, 1911, the United States adopted the demurrer and answer of the Interstate Commerce Commission and the cause was argued and submitted.

On October 13, 1911, eight days after the opinion was filed, the Commerce Court entered its final decree, viz:

> This cause coming on to be heard on the 26th day of May, A. D. 1911, on bill filed February 7th, 1910, and on demurrer and answer of Interstate Commerce Commission filed the 3d day of March, A. D. 1910, and having been argued by counsel, Mr. John Lee Webster appearing for the peti-

> tioners, Mr. Blackburn Esterline for the United States, and Mr. Charles W. Needham for the Interstate Commerce Commission, and upon due consideration thereof, it is now, this 13th day of October, A. D. 1911, ordered, adjudged, and decreed that the said above referred to demurrer of the respondent be, and the same is hereby, sustained, and that the bill of complaint herein be, and the same is hereby, dismissed.

In opposition to the application for a supersedeas, the following points are submitted:

I.

It is settled beyond the reach of debate that the final decree dismissing the bill dissolved the preliminary injunction.

> 22 Cyc., 981; vol. 1, *Joyce on Injunctions*, secs. 330*b*, 330*c*; vol. 10, *Ency. of Pl. and Pr.*, 1029; *Hovey* v. *MacDonald* (109 U. S., 150, 158, 161); *Sweeny* v. *Handley* (126 Fed. Rep., 97, 99).

In *Hovey* v. *MacDonald, supra,* the court said (158):

> The terms of the injunction were that the defendants should be restrained from receiving the money until the final hearing of the cause. Of course, when the cause was finally heard and the bill dismissed the injunction ceased to have effect by its own terms. The appointment of Mr. Riggs as receiver was for the purpose of holding the money as agent of the court, and withhold-

ing it from the defendants until the decision. The words of his commission were "to collect and hold the money until and subject to the further order of the court." It was therefore a necessary consequence of the decree of dismissal that the injunction should be dissolved and that the receiver should be discharged and directed no longer to withhold the money from the possession of the defendants. The dissolution of the injunction and the discharge of the receiver were directions of course to be inserted in the decree of dismissal, unless the court should affirmatively order otherwise. The court below, it is true, in view of the appeal, might have made an order to continue the injunction and to retain the property in the receiver's hands; but that was a matter of discretion, to be exercised according to the justice of the case. If the judge did not see fit to exercise it, it was of course to add to the decree of dismissal its legal effect and consequence.

II.

It is likewise settled that when the preliminary injunction was thus dissolved it can not be revived except by a new exercise of judicial power, and the appeal from the final decree dismissing the bill does not affect the dissolution of the injunction.

Knox County v. *Harshman* (132 U. S., 14). *Leonard* v. *Ozark Land Co.* (115 U. S., 465). *Hovey* v. *MacDonald* (109 U. S., 150, 161).

In *Knox County* v. *Harshman, supra,* the court said (16):

> The general rule is well settled that an appeal from a decree granting, refusing, or dissolving an injunction, does not disturb its operative effect. (*Hovey* v. *McDonald,* 109 U. S., 150, 161; *Slaughterhouse Cases,* 10 Wall., 273, 297; *Leonard* v. *Ozark Land Co.,* 115 U. S., 465, 468.) When an injunction has been dissolved, it can not be revived except by a new exercise of judicial power, and no appeal by the dissatisfied party can of itself revive it. *A fortiori,* the mere prosecution of an appeal can not operate as an injunction where none has been granted.
>
> As stated by Mr. Chief Justice Waite, in *Spraul* v. *Louisiana* (123 U. S., 516, 518), "The supersedeas provided for in 1007 of the Revised Statutes stays process for the execution of the judgment or decree brought under review by the writ of error or appeal to which it belongs."

III.

Equity rule 93 provides:

> When an appeal from a final decree, in an equity suit, granting or dissolving an injunction, is allowed by a justice or judge who took part in the decision of the cause, he may, in his discretion, at the time of such allowance, make an order suspending or modifying the injunction during the pendency of the appeal upon such terms, as to bond or otherwise, as he may consider

proper for the security of the rights of the opposite party.

When the Commerce Court ordered the bill dismissed it did not provide in the final decree that the preliminary injunction should remain in force and effect. Beyond question it intended that the order of the Interstate Commerce Commission should forthwith become effective. Had it not so intended, it would have provided otherwise under equity rule 19. In paragraph 7 of their application, the appellees expressly state that they, by their solicitor, personally applied to the presiding judge of the Commerce Court, and to Judge Mack, the writer of the opinion, "to know if the said court would not under the circumstances enter an order continuing the temporary injunction or suspending the operation of the order of the Interstate Commerce Commission pending the appeal, but which was not granted." The bill having been dismissed, and the preliminary injunction having been dissolved, and the Commerce Court having refused to continue the injunction in force, and the appeal to this court not affecting the dissolution of the injunction, this application falls squarely within the rule announced in *Staffords* v. *King* (90 Fed. Rep., 136). In that case the Circuit Court issued a preliminary injunction restraining certain persons from occupying and holding lands of which they were in possession, and the injunction was dissolved by the action of the court which granted it. The complainant appealed to the

Court of Appeals for the Fourth Circuit from the decree dissolving the injunction, and suspended its operation by giving a supersedeas bond. The Court of Appeals, speaking through Circuit Judge Simonton, said (140):

> The question we are called upon to decide is, did the supersedeas bond restore vitality to the injunction which the Circuit Court dissolved? A "supersedeas," properly so called, is a suspension of the power of the court below to issue an execution on the judgment or decree appealed from, or, if an execution has been issued, it prohibits further proceedings under it. (*Hovey* v. *McDonald,* 109 U. S., 159; 3 Sup. St., 136.) When an injunction has been dissolved, it can not be revived except by a new exercise of judicial power, and no appeal by the dissatisfied party can revive it. (*Knox Co.* v. *Harshman,* 132 U. S., at pp. 16, 17; 10 Sup. Ct., 8.) *And this language is broad enough to include an appeal with a supersedeas.* In *Hovey* v. *McDonald,* supra, the distinction is stated:
>
> The truth is that the case is not governed by the ordinary rules that relate to supersedeas of execution, but by those principles and rules which relate to chancery proceedings exclusively. * * * In this country the matter is usually regulated by statutes or rules of court, and generally an appeal, upon giving the security required by law (when security is required), suspends further proceedings, and operates as a

supersedeas of execution. * * * But the decree itself, without further proceedings, may have an intrinsic effect, which can only be suspended by an affirmative order, either by the court which makes the decree or by the appellate tribunal. This court, in the *Slaughter-House Cases* (10 Wall., 273), decided that an appeal from a decree granting, refusing, or dissolving an injunction does not disturb its operative effect. Mr. Justice Clifford, delivering the opinion of the court, says: "It is quite certain that neither an injunction nor a decree dissolving an injunction passed in a circuit court is reversed or nullified by an appeal or writ of error before the cause is heard in this court." It was decided that neither a decree for an injunction nor a decree dissolving an injunction was suspended in its effect by the writ of error, although all the requisites for a supersedeas were complied with. It was not decided that the court below had no power, if the purposes of justice required it, to order a continuance of the status quo until a decision should be made by the appellate court, or until that court should order the contrary. This power undoubtedly exists, and should always be exercised when any irremediable injury may result from the effect of the decree as rendered.

But this, it is added, is wholly discretionary; and the exercise of the power is not an appealable matter. This case is affirmed in *Knox Co.* v. *Harshman* (132 U. S., 16; 10 Sup. Ct., 8). Equity rule 93 was passed in accordance with this principle.

IV.

Section 2 of the act entitled "An act to create a Commerce Court," etc., approved June 18, 1910 (36 Stat., 542), provides:

> Appeal to the Supreme Court, however, shall in no case supersede or stay the judgment or decree of the Commerce Court appealed from, unless the Supreme Court or a justice thereof shall so direct, and appellant shall give bond in such form and of such amount as the Supreme Court, or the justice of that court allowing the stay, may require.

The learned counsel for the appellees appears to appreciate the difficulty in this case, for the prayer of the application is that this court "grant an appropriate order" superseding the judgment and decree of the Commerce Court, and suspending, pending this appeal, the order of the Interstate Commerce Commission. This court is not asked, and could not well be asked, to issue its own injunction against the order of the Interstate Commerce Commission. The appeal, as shown, does not revive the preliminary injunction. If this court should modify the order of the Commerce Court and reinstate the injunction, the practical effect would be to prejudge the case in advance of a full hearing. It was held in *Leonard* v. *Ozark Land Company* (115 U. S., 465) that this court would not follow such a practice; it promulgated the present equity rule 93 in order that the full responsibility in such matters might rest upon the Circuit Courts.

The order of the Interstate Commerce Commission was to become effective February 1, 1910. It will expire in less than three months. According to the opinion and judgment of the Commerce Court the order of the commission was erroneously suspended for one year and nine months. If this court enters an appropriate order further suspending the order of the commission, the order will expire before any final judgment can possibly be entered by this court on the merits, and the appellees will have avoided complying with the same while it lasted. In other words, if this court should now suspend the order of the Interstate Commerce Commission and on a final hearing affirm the judgment, the labors of the commission and the Commerce Court and this court would have been spent in vain.

The giving of a bond would avail nothing. The Interstate Commerce Commission and the United States are the appellees. If the appellees are named as the obligees of the bond, such a bond would be ineffective as to the passengers traveling between Council Bluffs and Omaha. As the nickels pass into the possession of the company, it is at once beyond the power of the passengers ever to prove the payments and recover them back. The statement of the proposition answers it.

Counsel also urge that to require the appellants "to comply with the order pending this appeal would put said companies to great embarrassment, inconvenience, and expense, as well as irreparable

loss and injury, if it be finally held that the Interstate Commerce Commission was without jurisdiction to make the order." Again, he says there would be confusion of transfers, etc. These matters were all urged before and answered by both the Interstate Commerce Commission and the Commerce Court.

Appellants do not apply for any particular order on any particular authority, but they ask the Court, in its discretion, to grant " an appropriate order " and offer to give " such bond as this Court should order and direct in the premises," leaving it to this Court to work out the method to accomplish the result.

It is respectfully submitted that the application for such appropriate order should be denied.

BLACKBURN ESTERLINE,
Special Assistant to the Attorney General.
CHARLES W. NEEDHAM,
For the Interstate Commerce Commission.

APPENDIX.

UNITED STATES COMMERCE COURT.

No. 25.

OMAHA & COUNCIL BLUFFS Street Railway Company and Omaha & Council Bluffs Railway & Bridge Company, petitioners, *v.* INTERSTATE COMMERCE COMMISSION, respondent. The United States, intervening respondent.	May session, 1911.

ON BILL AND DEMURRER.

For opinion and order of the Interstate Commerce Commission, see 17 I. C. C. Rep., 239.

For opinion of Circuit Court granting preliminary injunction, see 179 Fed., 243.

Mr. John Lee Webster, for petitioners.

Mr. Blackburn Esterline, special assistant to the Attorney General, for the United States.

Mr. Charles W. Needham, for Interstate Commerce Commission.

Before ARCHBALD, HUNT, CARLAND, and MACK, Judges.

[October 5, 1911.]

MACK, *Judge:*

The Omaha & Council Bluffs Railway & Bridge Co., hereinafter referred to as the bridge company,

an Iowa corporation, constructed, under authority of an act of Congress (act Mar. 3, 1887, 24, Stat., c. 356, p. 501), and now owns a joint railroad, wagon, and foot toll bridge over the Missouri River at Omaha, Nebr., and Council Bluffs, Iowa, and also owns a railway, which begins at the west end of the bridge in Omaha, Nebr., and extends eastward across the bridge to Council Bluffs, Iowa. The bridge company also owns the stock and bonds of the Omaha, Council Bluffs & Suburban Railway Co., a street railway line in Council Bluffs. The Omaha & Council Bluffs Street Railway Co., hereinafter referred to as the street railway company, owns and operates all of the street railway lines in Omaha, Nebr., in addition to which, in January, 1903, it leased all of the properties of the bridge company for a period of years, so that it now operates all of the lines of both systems.

Foot passengers pay 5 cents bridge toll; local street car fare in either city is 5 cents; interstate street railway passengers pay no direct bridge toll but a single fare of 10 cents, or $1.50 for 30 commutation tickets, for a ride to or from any point on the line in Council Bluffs, except Courtland Beach, over the bridge from or to any point on the line of the street railway company within the so-called loop in Omaha. Interstate passengers to or from a point in Omaha beyond the loop receive no transfers, but according to the practice sought to be corrected are required to pay an additional local fare of 5 cents. The loop district in Omaha extends westward on Douglas to Fourteenth Street, south upon that street to Howard, east to Eleventh, north to Douglas, and eastward back to the bridge.

On complaint the Interstate Commerce Commission refused to reduce the 10-cent fare to 5 cents, but abolished the loop limitation in Omaha, ordering the bridge and street railway companies not to charge more than 10 cents to or from any point on the line in Omaha from or to Council Bluffs, except Courtland Beach. The report of the commission will be found in 17 Interstate Commerce Commission Reports, 239. A bill was thereupon filed in the Circuit Court of the United States for the District of Nebraska, and a preliminary injunction was granted against the enforcement of this order. (*Omaha & C. B. St. Ry. Co.* v. *I. C. C.*, 179 Fed., 243.) The case was subsequently transferred to this court and is now up for disposition on a demurrer to the bill, except as to one paragraph, which is answered by adding to the order of the commission its report, thus making the latter a part of the record.

On the oral argument, though not in the briefs, it was suggested, in accordance with the charges of the bill, that the order of the commission in practically compelling the street railway company to give transfers in Omaha, went both beyond the issues in the case before the commission and beyond its constitutional as well as its statutory powers in that it thereby attempted to regulate the strictly intrastate affairs of the street railway company by an order which had no reference to the transportation over the bridge, but to what should happen after it was complete, compelling the company in effect to render an additional service without compensation. But the complaint before the commission was that the 10-cent fare between Council Bluffs, Iowa, and Omaha, Nebr., was un-

reasonable and unjust, and it was prayed that the defendants be required to make and fix passenger fares to apply in future to the transportation of passengers from Council Bluffs to Omaha, and the reverse, which should not exceed 5 cents per passenger or such charge as the commission should find reasonable and just. The report recited that the complainant assailed the 10-cent fare between the two cities over the bridge as unreasonable and prayed that " no extra charge be made when in the course of interstate transportation passengers are carried over such bridge," and the establishment of a 5-cent fare.

While the primary object aimed at was the reduction of the 10-cent fare to 5 cents, the prayer for the abolition of all extra charges and the fixing of a reasonable rate for interstate passenger transportation between the two cities fairly included, in our opinion, the elimination of the loop boundary for the 10-cent fare. Moreover, the commission expressly states in the report that " the reasonableness of confining it (the 10-cent fare) to points on the loop is put in issue in these proceedings."

The lines from the bridge in Omaha to and through the loop do not constitute a system separate and distinct from those beyond the loop. Both are under the common ownership, control, and operation of the street railway company. Local passengers pay a single fare within the city of Omaha between all points, receiving the necessary transfers at junction points to and from the loop.

The question presented was, therefore, not whether an independent company operating solely in Omaha beyond loop points and exchanging transfers solely for local passengers with an interstate

company operating the loop lines could be compelled to give transfers to interstate passengers as well—as to which we intimate no opinion—but whether or not the interstate company, operating all the lines as one system, the parts of which are independently operated only in a physical sense, in that transfers are necessary from and to the loop, could be compelled, without additional compensation, to carry an interstate passenger to a point on its own lines beyond the loop district; in other words, whether 15 cents is or is not a reasonable fare to be paid for the entire interstate journey made on the several lines operated by the street railway company. So stated, the question is obviously one of the reasonableness of interstate passenger rates, and as such clearly within the jurisdiction of the commission, if it has any jurisdiction over corporations such as the street railway company.

Complainants do, however, allege—and this brings us to a consideration of the principal and important question in the case—that the Interstate Commerce Commission, under the act, has no jurisdiction over interstate passenger rates charged by a corporation engaged in the business in which the street railway company is engaged here.

The judges of the Circuit Court before whom the case originally came, in granting a preliminary injunction, held that the complainants were street railway companies engaged in operating street cars for passenger transportation, and not commercial railroad companies engaged in the general transportation of freight and passengers, and as such did not come within the class of corporations

over whose rates the Interstate Commerce Commission has been granted jurisdiction. The cases cited in support of this view involved the interpretation of various State acts establishing commissions, regulating taxes, providing for joint rates or connections, giving mechanic's liens, abolishing the fellow-servant rule, or in other ways dealing with railroad problems. Under these statutes it was held that in as much as commercial railroads and street railways were classified separately by the legislatures, electric street railways would not be deemed to be embraced within the general term "railroad," as used in such acts. The principal of these cases, which cite the others, are *R. R. Commission* v. *Market Street R. R. Co.*, 132 Cal., 677 (65 Pac., 1065), and *Sams* v. *St. Louis, etc., Ry. Co.*, 174 Mo., 53 (73 S. W. Rep., 686). In each of these there was a vigorous dissenting opinion.

No court decision has been found directly involving an interpretation on this point of the Federal act to regulate commerce, although in the *Employers' Liability cases* (207 U. S., 463, at 497) Mr. Justice (now Chief Justice) White said: "From the first section it is certain that the act extends to every individual or corporation who may be engaged in interstate commerce as a common carrier. Its all-embracing words leave no room for any other conclusion. It may include, for example, steam railroads, telegraph lines, telephone lines, the express business, vessels of every kind, whether steam or sail, ferries, bridges, wagon lines, carriages, trolley lines, etc."

The conclusion of the Interstate Commerce Commission that it has such jurisdiction is supported by its earlier decision in *Willson* v. *Rock Creek Ry.*

Co. (7 I. C. C. Rep., 83) and by its later decision in *Beall* v. *Washington, Alexandria & Mt. Vernon Ry. Co.* (20 I. C. C. Rep., 406). While two commissioners dissented as to the jurisdictional question in the *Rock Creek Ry. Co.* case in 1897, all concurred in the order which is sought to be enjoined in the present case, Prouty, C., speaking as well for Commissioners Knapp and Cockrell as for himself, making the following statement: "In *Willson* v. *Rock Creek Ry. Co.* (7 I. C. C. Rep., 83) I expressed the opinion that the act to regulate commerce did not apply to ordinary street railways. I still entertain the same opinion, but a majority of the commission thought otherwise in that case, and for the 12 years since we have uniformly adhered to that holding. It seems to me that this should be accepted as the settled law for this body until reversed by a majority of the commission or disapproved by a court of competent jurisdiction."

The fact that the opinion of the majority of the commission in the *Rock Creek Railway Co.* case has been acted on for so many years should compel us to hesitate before adopting an interpretation of the act contrary to that of the commission. On the other hand, the opinion of such experienced judges as granted the preliminary injunction in the present case and the doubts of our colleague, the presiding judge of this court, while chairman of the commission, and of his two associates, necessitate a careful examination of the question in the endeavor to ascertain whether or not, even though certain words literally construed may be held to grant the jurisdiction, a reasonable interpretation of the entire act, in the light of its history and of

the evils sought to be remedied and of the later amendments, supports the literal construction; in a word, whether sound interpretation of both the spirit and the letter of the statute sustains the jurisdiction of the commission.

There is no question that Congress could have granted jurisdiction over interstate street railway companies carrying only passengers. Neither is it controverted that, under the act, the commission has jurisdiction over some corporations engaged in interstate transportation of passengers alone, as well as over some corporations engaged in interstate transportation using electricity instead of steam as the motive power. But it is argued that, as the act itself shows, Congress never intended to exercise its power of regulation over all persons or corporations engaged in interstate transportation (having expressly excluded water carriers, for instance, except where operating in direct connection with a railroad under a common arrangement for continuous carriage); that the evils which compelled the intervention of Congress were due to the acts and omissions of the great railroad systems; that street railways in 1887 were ordinarily purely local and municipal, operated mostly by animal power and fully regulated by municipal ordinances; that many of the provisions of the act are entirely inapplicable to street railways; that commercial railroads, operated ordinarily by steam and vested with rights of eminent domain, are generally differentiated in legislation from street railways operated to-day ordinarily by electricity, generally not endowed with the right of eminent domain, and running usually upon city streets and public highways and not on private property; and that for these, as

well as for other reasons, electric interurban passenger street railways are not included within the classes of common carriers over which jurisdiction was granted by sec. 1 of the act. The relevant part of this section as it was in force when these proceedings were begun in the Circuit Court is copied.[1]

Intermediate between the ordinary urban street railways which, in the case of cities or towns near each other, whether in the same State or not, become State or interstate interurban surface railways carrying only passengers, and the commercial railroads carrying passengers and freight and

[1] SEC. 1. That the provisions of this act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, who shall be considered and held to be common carriers within the meaning and purpose of this act, and to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment) from one State or Territory of the United States or the District of Columbia to any other State or Territory of the United States or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent country: *Provided, however*, That the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of the property wholly within one State and not shipped to or from a foreign country from or to any State or Territory as aforesaid.

The term "common carrier" as used in this act shall include express companies and sleeping-car companies. The term "railroad," as used in this act, shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, and shall also include all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards, and grounds used or necessary in the transportation or delivery of any of said property.

operated usually by steam, are the so-called interurban electric roads. These have been organized, or at any rate have become important factors in transportation, since 1887. They usually carry mail, express matter, and some freight as well as passengers, and do not only a local business in more than one city and between cities, but also between city and country. It is conceded by counsel that corporations operating such roads, even though differing in many respects from so-called commercial railroads, come within the jurisdiction of the commission when engaged in interstate transportation. The commission so held in *C. & E. Elec. R. R. Co.* v. *I. C. R. R. et al.* (13 I. C. C. Rep., 20) and *C. & C. Traction Co.* v. *B. & O. S. W. R. R. Co.* (20 I. C. C. Rep., 486). In Nebraska and some other States corporations operating such interurban roads are, moreover, created under the general railroad acts.

The present street railway company differs from this class of interurban roads in that is is created under the street railway act of Nebraska; it does not and is not empowered to carry freight; and, moreover, unlike some interurban roads, it has no right of eminent domain. Like these, however, it carries mail; it serves not one but two cities and several towns, villages, and resorts; and though the bill of complaint alleges that the rails of the street railway company are all on streets and highways, it does not deny the statement in the report of the commission, referring probably to the leased lines of the bridge company, that the rails are not all laid in streets and highways, but for some distance run over private right of way and over the bridge across the Missouri River.

While, as complainant urges, the Nebraska corporation is the only party actually affected by the order, nevertheless the order is directed against it, not in relation to its business as a local Nebraska street railway corporation, but to its business as a carrier engaged in interstate transportation. As such carrier it is the successor of the Iowa corporation, the bridge company. Whatever may be the latter's charter limitations as an Iowa corporation, it erected the bridge and the lines thereon (both now leased to and operated by the street railway company) under power granted to it by Congress to construct, operate, and maintain the bridge and a " steam, electric, * * * or other line of railway."

Whether or not the street railway company is empowered as a Nebraska corporation to operate the bridge and the Iowa lines is immaterial in this case; it is, rightly or wrongly, engaged in their operation, and it is, therefore, a common carrier engaged in the interstate transportation of passengers by electric railway.

It is likewise immaterial to this inquiry that the street railway company is created under the street railway and not under the commercial railroad act of Nebraska. If, soundly interpreted, the Federal act gives the commission jurisdiction over such electric railways, State legislation is powerless to limit or to prevent such grant.

Does, then, the lack of statutory power to carry freight and to exercise the right of eminent domain so differentiate such a corporation as this street railway company from the modern interurban roads as to exempt it from the jurisdiction of the commission?

Great stress is laid upon a statement by Senator Cullom, chairman of the Senate committee, when the original act of 1887 was under consideration (Cong. Rec., vol. 17, pt. 4, p. 3472), that: "The bill is not intended to affect the stagecoach, the street railway, the telegraph lines, the canal boat, or the vessel employed in the inland or coasting trade, even though they may be engaged in interstate commerce, because it is not deemed necessary or practicable to cover such a multitude of subjects."

But whatever view may have been so expressed, it can not determine the correct interpretation of the act, particularly as it now stands, with all the changes that have been introduced since 1887.

If the language be broad enough to include such a corporation as the present street railway company, and there is no contention but that "railroad" may be and frequently is synonymous with or inclusive of "street railways," it is, moreover, immaterial that Congress may not specifically have intended to confer jurisdiction over the few comparatively insignificant interstate horse street railways of 25 years ago.

A statute of the scope of the interstate commerce act, designed to regulate the vast interstate transportation business of the country, is not to be narrowly interpreted—any more than the Constitution—in accordance with the economic or physical conditions prevailing at the time of its adoption. Then, too, the decision in *Wabash, St. Louis, etc., Railway Co.* v. *Illinois* (118 U. S., 557), definitely denying to the States the right to fix or regulate interstate rates for passengers, and thereby necessitating some congressional action, is as applicable

in its reasoning to interstate street railway rates as to those of commercial railroads. Unless the commission has jurisdiction over those rates they are absolutely uncontrolled.

As noted above, while Congress has expressly excluded water carriers, except when operated in direct connection with a railroad, it has not expressly excluded street railways. Moreover, the act has been several times amended since the *Rock Creek Railway Co.* case; and not only has Congress thus by its failure to exclude street railways apparently concurred in the construction there given, but by the latest amendment it has, in fact, given its apparent sanction thereto.

In 1910 section 15 of the act was amended to read: "The commission shall not, however, establish any through route, classification, or rate between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business and railroads of a different character," which is the first specific mention of street electric passenger railways. This proviso, following the grant of power to establish through rates, etc., between railroad carriers, would have been totally unnecessary unless the commission had theretofore had jurisdiction over street electric passenger railways. Congress, therefore, must have enacted the legislation of 1910 upon the assumption that such jurisdiction had been conferred upon the commission by the original act.

The argument that many of the requirements of the act would be impossible of accomplishment by street railways does not impress us, inasmuch as this is at least equally true of sleeping-car companies, pipe lines, telegraph and telephone com-

panies, all of which are expressly covered by the statute. As to each of them only such of its provisions as are applicable will be deemed to refer to such companies, respectively.

The frequent repetition of the phrase "passengers *or* freight" clearly indicates that a carrier of passengers only is as subject to regulation by the commission as is a carrier of both freight and passengers.

Finding substantially nothing either in the language of the statute or in the history of this legislation that indicates an intent to exclude interstate passenger street railways from its operation, and finding, on the contrary, that the words of the act are broad and comprehensive enough to include them and that some at least of the evils sought to be remedied by this legislation can be corrected only if the commission have such jurisdiction, we are compelled to differ from the views expressed by the Circuit Court in granting the preliminary injunction, and to hold that power has been delegated to the commission to regulate rates of transportation by such companies as the complainants herein, which requires us to sustain the demurrer of the defendants and to dismiss the bill. And it is so ordered.

A true copy.

Test:

[SEAL.] G. F. SNYDER,

Clerk of the United States Commerce Court.

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